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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

A. REGINALD EAVES, et al.,

Appellants,

vs.

JOE FRANK HARRIS, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF GEORGIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

I. Whether a duly elected public official may be suspended from office based solely on the issuance of an indictment against him where the official is afforded no opportunity for a hearing, no opportunity to confront his accusors, and no opportunity to present evidence in his defense, or whether such action violates the Fourteenth Amendment rights of the public official and those persons who cast their ballots for him.

PARTIES

The parties to this Appeal are A. Reginald Eaves, Pamela A. Stanley, and Dr. Bernard J. Bridges, as appellants; Joe Frank Harris, the Governor of the State of Georgia, and Michael J. Bowers, Attorney General of the State of Georgia, as appellees.

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The decision of the Supreme Court of Georgia appealed from is reported at 258 Ga. 1, 364 S.E.2d 854 (1988).

JURISDICTION

This appeal is taken from the February 16, 1988 decision of the Supreme Court of Georgia, the highest court of that State, upholding the denial of declaratory and injunctive relief to appellants. That court held that Section 45-5-6 of the Official Code of Georgia Annotated did not violate appellants' rights under the First and Fourteenth Amendments to the United States Constitution.

A Notice of Appeal was timely filed on February 22, 1988 in the Supreme Court of Georgia, which appears as Part II of the Appendix.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. §45-5-6:

(a) As used in this Code section, the term "public official" means any elected county officer; any elected member of a county governing authority; any elected member of a city-county consolidated government; any member of a county, area, or independent board of education; any school superintendent of a county, area, or independent school system; any solicitor of a state court; any elected member of any municipal governing authority; any member of the Public Service Commission; and any district attorney.

(b) Upon indictment for a felony by a grand jury of this state or by the United States, which felony indictment relates to the performance or activities of the office of any public official, the Attorney General or district attorney shall transmit a certified copy of the indictment to the Governor who shall, subject to subsection (e) of this Code section, appoint a review commission. Except as provided in this subsection, the commission shall be composed of the Attorney General and two public officials who hold the same office as the individual indicted. The members of the commission shall receive no compensation for their services, but shall be reimbursed for any expenses incurred in connection with the investigation. The funds necessary to conduct the investigation shall come from

funds appropriated to the executive branch of government. If the Attorney General brings the indictment against the public official, the Attorney General shall not serve on the commission. In place of the Attorney General, the Governor shall appoint a retired Supreme Court Justice or a retired Court of Appeals Judge.

(c) Unless a longer period of time is granted by the Governor, the commission shall make a written report to the Governor within 14 days. If the commission determines that the indictment relates to and adversely affects the administration of the office of the indicted public official and that the rights and interests of the public are adversely affected thereby, the commission shall recommend that the public official be suspended from office. If, and only if, the

commission recommends suspension, then the Governor shall review the findings and recommendations of the commission and may suspend the public officer from office immediately and without further action pending the final disposition of the case or until the expiration of his term of office, whichever occurs first. During the term of office to which such officer was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the public official shall be immediately reinstated to the office from which he was suspended. While a public official is suspended under this Code section and until initial conviction by

the trial court, the public official shall continue to receive the compensation from his office. After initial conviction by the trial court, the public official shall not be entitled to receive the compensation from his office. If the public official is reinstated to office, he shall be entitled to receive any compensation withheld under the provisions of this Code section.

(d)(1) For the duration of any suspension of any elected member of any municipal or consolidated city-county governing authority under this Code section, a replacement office for the public officer suspended shall be appointed as provided for in any general law, local law, ordinance, or resolution governing the filling of a temporary vacancy in the public office affected. For the duration

of any suspension of any other public official under this Code section, a replacement officer for the public official shall be appointed as provided for in any applicable general or local law governing the filling of a temporary vacancy in the public office affected. If no such general law, local law, ordinance, or resolution governing the filling of a temporary vacancy is applicable, then the Governor shall appoint a replacement officer for the public official suspended.

(2) Upon the final conviction, the office of the public official shall be vacated immediately without further action. Said vacancy shall be filled in the manner provided by law for filling vacancies in such office.

(e) No commission shall be appointed for a period of 14 days from the day the Governor receives the indictment. This period may be extended by the Governor. During this period of time, the indicted public official may, in writing, authorize the Governor to suspend him from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement, or declaration of vacancy as are provided in this Code section for nonvoluntary suspensions.

(f) After any suspension under this Code section, the suspended public official may petition the Governor for a review. The Governor may reappoint the commission to review the suspension. The commission shall make a written report in 14 days. If the commission recommends that the

public official be reinstated, he shall immediately be reinstated to office.

(g) The report and records of the commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose. The report and records of the commission shall not be open to the public.

(h) The provisions of this Code section shall not apply to any indictment handed down prior to January 1, 1985.

(i) If a public official who is suspended from office under the provisions of this Code section is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the public official

shall be reinstated to office. The public official shall not be reinstated under this subsection if he is not so tried based on a continuance granted upon a motion made only by the defendant.

STATEMENT OF THE CASE

Appellant A. Reginald Eaves was re-elected in 1986 to a four year term on the Fulton County Commission in Atlanta, Georgia. At the time of his election, and at all times relevant to this action, appellant Eaves enjoyed all qualifications required under Georgia law to hold office. Appellants Pamela A. Stanley and Dr. Bernard J. Bridges are registered voters who cast their ballots for Mr. Eaves in the 1986 election. Both persons joined in the complaint, and join in this appeal, in order to enforce their rights and interests as voters.

On October 16, 1987, a four count federal indictment was returned against Commissioner Eaves based on the Hobbs Act, alleging improper action by him in connection with his office. The indictment was based solely on a "sting investigation" conducted by the FBI, known as the Vespine Operation. Commissioner Eaves entered a plea of not guilty at his arraignment.

Upon the issuance of the indictment, the Governor of Georgia, Joe Frank Harris, and the Attorney General, Michael J. Bowers, initiated proceedings to suspend Commissioner Eaves under O.C.G.A. §45-5-6. Pursuant to that statute, appellant Eaves was given until November 12, 1987 to "voluntarily" remove himself from office. After that date, he was subject to involuntary suspension by action of a "review commission" and the Governor. On

November 12, 1987, appellants filed the instant action in the Superior Court of Fulton County, seeking, inter alia, to enjoin defendants from removing appellant Eaves from office and to provide declaratory relief with regard to the unconstitutionality of O.C.G.A. §45-5-6. Appellants' prayer for a preliminary injunction was denied on the day the complaint was filed, and the Superior Court entered summary judgment in favor of defendants on November 16, 1987.

Immediately upon the denial of appellants' request for injunctive relief in the Superior Court on November 12, 1987, defendant Harris appointed a "review commission" to pass on the suspension of Commissioner Eaves. The commission met on November 20, 1987, and Mr. Eaves appeared before the commission with

counsel. Appellant Eaves moved for a dismissal of the proceeding and a recommendation of non-suspension because no evidence was presented in support of the accusations of the indictment. Notwithstanding the absence of any evidence, the commission members recommended suspension. Approximately one hour later, based on this recommendation, Governor Harris suspended Commissioner Eaves from his office. His actions were taken based solely upon the issuance of the indictment against Commissioner Eaves. At no time during the course of these proceedings pursuant to O.C.G.A. §45-5-6 was Commissioner Eaves afforded any opportunity to: (1) confront his accusors; (2) present any evidence to refute the allegations of the indictment; or (3) appear at hearing at

which the allegations in the indictment would be reviewed.

The action of the Governor and the review commission were mandated by the statute that is at issue in this case because it automatically dictates the suspension of county commissioners such as appellant Eaves when an indictment issues that in any way relates to the performance of his official duties. This point was made clear by Attorney General Bowers, who served as the presiding officer of the "review commission," when he instructed the other members of the commission concerning the narrow scope of their responsibility:

> Mr. Bowers: Having been on these sorts of review commissions in the past, I will tell you what has been our practice in the past and what to the best of my knowledge is correct

for us to do or not to do with respect to what you have raised.

First of all, as to the very important question of what we do with respect to the facts that the assertions or allegations in the indictment have neither been proved or disapproved? I think we must accept the facts in the indictment for purposes of our deliberation as being true.

Mr. Greene: In the indictment?

Mr. Bowers: That's correct. Absolutely. Then we must --

Mr. Greene: You say that from a legal point?

Mr. Bowers: That's the best I know. (Tr. 26-27)

On February 16, 1988, the Supreme Court of Georgia upheld the Superior Court's ruling that the statute at issue was a constitutional one. The dissenting opinion of Justice Smith agreed with the contentions of the appellants and reasoned that the statute was unconstitutional for

the reasons asserted. As Justice Smith wrote:

> The statutory procedure does not comport with due process. "An elected city official who is entitled to hold an office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process." Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir. 1979). "Due process of law, as guaranteed by article I, section I, paragraph III, of the [Georgia] Constitution (Code, Ann., Sec. 2-103), includes notice and hearing as a matter of right in matters where one's property rights are involved. Robitzsch v. State, 189 Ga. 637 (7 S.E.2d 387); Southern Ry. Co. v. Town of Temple, 209 Ga. 722, 724 (75 S.E. 554)." Sikes v. Pierce, 212 Ga. 567, 568 (94 S.E.2d 427) (1956). The statute does not provide for a meaningful hearing. There is no opportunity for the review commission to hear evidence[1] which might indicate that the indictment does relate to or

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[1] "An indictment is not evidence, but is merely the manner in which charges are brought before the court for trial." Skipper v. State, No. 44802, decided 2/11/88.

adversely affect the administration of the office or the rights and interests of the public. More importantly, the statute does not provide the official an opportunity to present evidence to the contrary.

"All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are trustees and servants of the people and are at all times amenable to them." Constitution of Georgia of 1983, Article I, Section II, Paragraph I. Removal of a public official under OCGA § 45-5-6 without a meaningful hearing not only denies the public official his right to due process, it abolishes the right of his constituents to have their duly elected official in office, and it denies the official a fundamental presumption in the law -- "Every person is presumed innocent until proved guilty." OCGA §16-1-5. 258 Ga. 1, 6-7, 364 S.E.2d 854 (1988) (footnote omitted).

On May 2, 1988, the jury acquitted Commissioner Eaves on one of the four counts, and returned guilty verdicts on the other counts. Sentencing is set for

June 27, 1988, and an appeal is anticipated thereafter concerning various issues that arose at trial, including what jury charges are appropriate in a public official case under the Hobbs Act.

The parties agree that the present appeal is not moot on account of the intervening trial, as discussed more fully below.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I. THE GEORGIA SUPREME COURT HAS DISREGARDED SETTLED PRECEDENT FROM THIS COURT IN HOLDING THAT A DULY ELECTED PUBLIC OFFICIAL MAY BE SUSPENDED FROM OFFICE BASED SOLELY ON THE ISSUANCE OF AN INDICTMENT AGAINST HIM WHERE THE OFFICIAL IS AFFORDED NO OPPORTUNITY FOR A HEARING, NO OPPORTUNITY TO CONFRONT HIS ACCUSORS, AND NO OPPORTUNITY TO PRESENT EVIDENCE IN HIS DEFENSE.

A. The Georgia Supreme Court Erroneously Held that the Constitutional Rights of Voters, Such as Appellants Stanley and Bridges, Was Not Implicated by The Statutory Scheme and Executive Action at Issue Here.

Appellants challenge to the Georgia statutory scheme, and the Governor's action, was based on two separate sets of interests -- that of appellant Eaves in his office, and that of the voters who cast ballots to elect him to that office. The Georgia Supreme Court held that the voters' constitutional rights were not abridged by the statute, even though their ballot had been rendered nugatory, because another person was appointed to serve on the commission during the period of Mr. Eaves' suspension. That person, of course, never faced the electorate before his appointment, nor was the

continuation of his appointment during the suspension conditioned on any confirmation by the electorate. By so holding, the Georgia Supreme Court disregarded repeated holdings of this court that the fundamental right of citizens to vote is a constitutionally protected right of paramount significance. See, e.g., Reynolds v. Sims, 377 U.S. 533, 537 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

The Georgia Supreme Court reasoned that appellants' right to vote was not abridged because they had been entitled to cast a ballot without restriction at the original election. But this reasoning disregards the fact that the ballots of tens of thousands of voters were negated when the person whom they chose to represent them was suspended from office

without any pretense of due process. The constitutionally protected right to vote protects more than the mere casting of the ballot. It contemplates, as well, the right to cast a meaningful ballot, and one that will be recognized and honored by the government. Anderson v. Celebrezze, 460 U.S. 780 (1983); Rogers v. Lodge, 458 U.S. 613 (1982); Dunn v. Blumstein, 405 U.S. 330 (1972); Bullock v. Carter, 405 U.S. 134 (1972); Williams v. Rhodes, 393 U.S. 23 (1968). The votes of appellants and others similarly situated were undercut by defendants' suspension of Commissioner Eaves solely because of the issuance of an indictment and without any inquiry into the facts underlying the charges. Indeed, it is difficult to imagine a more wholesale abridgement of

the right to vote than refusing to allow a person purportedly elected to serve in the office he was elected to, absent some constitutionally satisfactory procedure for determining the propriety of his continuing in that office.

B. The Majority Opinion Erred in Concluding That the "Procedures" Used to Suspend A Charged Public Official Comport With Due Process.

Over the dissent of Justice Smith, the majority of the Georgia Supreme Court held that the "procedures" established by O.C.G.A. §45-5-6 satisfied due process. This holding disregards the decisions of this court.

Under Matthews v. Eldridge:

> [T]he specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest due to the

> procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the physical and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 335.

The "interest" that is affected by the suspension of a duly elected officeholder from his office is a very basic one. By virtue of appellees' actions, appellant Eaves has been prevented from doing what an entire electorate elected him to do -- vote on the numerous issues that effect the everyday lives of the citizens of Fulton County. Rather than decisions being made by the individual who was elected to make them, they have been made by a political appointee answerable to no voter.

The combination of the interest of the voters in having their democratically elected official continue to represent them, and the interest of the officeholder to continue serving in the office to which he was duly elected, are interests of fundamental significance in a democratic system, and under the Mathews analysis, are entitled to great weight.

Under O.C.G.A. §45-5-6, no evidence need be presented, or may be presented, to support the accusation of the indictment. The mere fact of indictment alone controls. The commission rejected the appellants' motion in the present case to give a recommendation of non-suspension since no evidence was presented against him. While Mr. Eaves was, as a matter of grace, permitted to attend the review commission proceeding, and have counsel

present, his appearance was a meaningless gesture. Under the statute, the officeholder is allowed no input into the outcome. Because the allegations of the indictment are irrebuttably presumed to be true, there is no evidence presented against the officeholder to which he can respond. Such irrebuttable presumptions are unconstitutional even when less important rights are involved than in the present case. Taylor v. Kentucky, 436 U.S. 478 (1978); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); U.S. Department of Agriculture v. Murry, 413 U.S. 508 (1973).

This court has repeatedly held that due process requires an adversarial hearing and other procedural rights even when a person is threatened merely with a loss of some statutory privilege or a

private property interest. Peralta v. Heights Medical Center, Inc., 56 U.S.L.W. 4189 (U.S. Feb. 23, 1988); In Re Murchison, 349 U.S. 133, 136 (1965); Goldberg v. Kelley, 397 U.S. 254 (1970); Bell v. Burson, 402 U.S. 535 (1971); Mathews v. Eldridge, 424 U.S. 319 (1976); Cleveland Baord of Education v. Loudermill, 1005 S.Ct. 1487 (1985). Under the statute at issue here, there is no possible cross-examination of any accusor since the "review commission" doesn't even inquire of any accusors. The defendant cannot even maintain an affirmative burden of attempting to convince the commission that the allegations in the indictment are untrue since the matter is conclusively presumed against him. The only evidentiary "review" which exists under the statute is the "review" conducted by the grand

jury itself in the context of a secret, ex parte proceeding controlled exclusively by the prosecuting authorities, and conducted without any opportunity to present even the most limited defense. In our system of justice, the fundamental rights of voters and officeholders should not be abridged merely on the basis of such an indictment.

Not only is there no adversarial proceeding before the grand jury, so that only "one side" is told in whole or in part, there is no requirement that the "evidence" before the grand jury bear any particular quality or quantity. In the case of a federal indictment, the indictment is good even if based on inadequate or incompetent evidence, United States v. Calandra, 414 U.S. 338, 345 (1974), or even if perjured testimony was presented

to the Grand Jury. United States v. Roth, 777 F.2d 1200, 1203-04 (7th Cir. 1985). A federal indictment is valid even if "the grand jury lacked sufficient evidence to make a rational finding of probable cause." 777 F.2d at 1203.

Appellees fare no better under the third "prong" of Mathews. While the State undoubtedly has an interest in promoting the confidence in its public institutions and in the efficient operation of a governmental body, that interest must be balanced against the tremendous loss that occurs in a democratic system when the votes of thousands of voters are effectively negated by an indictment. Moreover, the "fiscal and administrative burdens" that the State would have to bear if its "review commission" were required to extend minimal due process

safeguards to the officeholder are not significant.

In Goss v. Lopez, 419 U.S. 565 (1975), this Court held that, even if the context of a brief suspension from a state academic institution for disciplinary reasons, the due process clause mandates some type of meaningful hearing. As the court wrote:

> The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sssure that an injustice is not done. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights . . . . Secrecy is not congenial to truth-seeking

and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of a serious loss notice of the case against him and an opportunity to meet it." Id. at 580.

Surely, if due process mandates that an affected student be afforded such protections in the context of a limited suspension, an elected officeholder cannot be suspended from serving his constituents, for months, without at least affording the officeholder, and through him his voters, similar protection. The interest at stake is too great, the risk of an erroneous deprivation too profound, and the additional burdens on the State too small for the due process clause to stand for anything less.

C. O.C.G.A. §45-5-6 Denies Appellants Equal Protection Under The Laws as Guaranteed By the Fourteenth Amendment.

Where a "fundamental right" under the Constitution may be impinged, equal protection requires that the classifications established by the statute at issue be subject to a strict scrutiny test -- i.e., the classification established by the State must be necessary for the achievement of a compelling state interest. Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Board of Elections, 383 U.S. 663 (1966). Appellant Eaves was elected by the citizens of the Fifth District of Fulton County to represent them in the affairs of Fulton County Government. Due to the action of the "review commission" and the Governor, the voters of this district, unlike other voters in Fulton

County, were left without an elected representative on the Fulton County Commission. Instead, they have been represented by a person whom they have not chosen, and whose goals for Fulton County might be directly opposite their own.

In Kucinich v. Forbes, 432 F.Supp. 1101 (N.D. Ohio 1977), the Cleveland City Council suspended a city councilman for allegedly impugning the motives of a fellow councilman. In holding that this action violated equal protection guarantees, the court began with the unassailable proposition that:

> [T]he right to vote is 'a fundamental political right . . . preservative of all other rights.' [Cits.] In order to effectuate the right to vote and to make it meaningful, the right to representation, equal representation, must also be considered a fundamental right. As the Supreme

> Court stated, ' . . . the fundamental principle of representative government in this country is one of equal representation. Id. at 1116.

On this basis, the Kucinich court held that it was incumbent upon the defendants to "show a compelling reason for depriving Dennis Kucinich of his right to representation." In finding no such interest, the court held that Kucinich's exclusion was violative of equal protection.

In the case at bar, appellants Stanley and Bridges have a fundamental right to equal and meaningful representation on the Fulton County Commission, and a deprivation of that right may only be justified by the existence of a compelling state interest. None exists here.

While an indictment is a fact, it also is the product of a secret, ex parte proceeding conducted under the auspicies

of the prosecuting authorities, and with only their viewpoint having been taken into account by the grand jury. The existence of an indictment does not mean that an elected official has done something which renders him unfit for his office. An indictment is nothing more than a mere accusation. Federal Grand Jury Handbook at 21 (1980). In all state and federal courts, juries are routinely charged that an indictment is "no evidence" of the guilt of the defendant.

No showing was made in this case, nor could one be made, that the mere pendency of allegations in an indictment against an elected officeholder renders that official incapable of effectively performing the duties of his office, or that it will, ipso facto, impair the operation of county government. The

attempted classification under O.C.G.A §45-5-6 between indicted and non-indicted officials is not arguably necessary for the furtherance of any compelling state interest, and on this basis, must be held violative of equal protection.

II. THE ISSUES PRESENTED BY THIS APPEAL ARE NOT MOOT.

Appellant Eaves has now been acquitted of one of the four charges, convicted of the other three, and is awaiting sentence. His conviction will likely be on appeal at the time this court disposes of the instant appeal.[1] The occurrence of the

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[1] Among other issues, Mr. Eaves' appeal would raise questions concerning the scope of the Hobbs Act and the prosecution of local public officials concerning which there is a split in the circuits. Compare United States v. Capo, 817 F.2d 947 (2nd Cir. 1987); United States v. O'Grady, 742 F.2d 682 (2nd Cir. 1984) (en banc) with United States v. Swift, 732 F.2d 575 (11th Cir. 1984); United States v. Glass, 709 F.2d 669 (11th Cir. 1983).

intervening trial, and the pendency of the appeal, do not render the instant case moot. Instead, this case is a classic example of cases that should be reviewed on appeal because the circumstances are "capable of repetition, yet evading review," a doctrine evoked most frequently in election cases such as the present one. See Storer v. Brown, 415 U.S. 724, 737 n. 8 (1974); Mandel v. Bradley, 432 U.S. 173, 175 n. 1 (1977); Dunn v. Blumstein, 405 U.S. 330, 333 n. 2 (1972).

Under the statutory scheme at issue here, the state trial and appellate proceedings were as expedited as possible. The trial court reached a full disposition of the merits within a few days of the complaint being filed. The appeal was then ordered expedited by the trial court

and the Georgia Supreme Court. But nevertheless, a verdict was reached in Mr. Eaves' case just over six months after the issuance of the indictment. Because of the relatively short time between the issuance of the indictment and trial, it was not possible to complete an appeal to the United States Supreme Court before trial. With near certainty, the exact same situation would occur in any future instance where the Georgia statute at issue was challenged.[2] For that reason, unless this court applies the "capable of repetition, yet evading review" doctrine here, it would be impossible to ever obtain review of the statute in this Court.

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[2] The Georgia statutory scheme has been invoked rather frequently since its recent enactment.

> In the context of elections where fragile rights are at stake, courts must be careful to avoid dismissing litigation as moot. CBS, Inc. v. FCC, 629 F.2d 1, 28 D.C. Cir. 1980), aff'd, 453 U.S. 367 (1981).

Appellants' counsel understand that counsel for appellees agree that this case is not moot.

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GEORGIA SUPREME COURT DECISION

FEBRUARY 16, 1988

45233. EAVES et al. v. HARRIS et al.

HUNT, JUSTICE.

On October 16, 1987, Fulton County Commissioner A. Reginald Eaves was indicted by a federal grand jury on four counts of violations of the Hobbs Act, 18 USCA § 1951 et seq. The charges involved taking bribes from an agent posing as a developer seeking changes in zoning. Anticipating implementation of O.C.G.A. § 45-5-6, which provides that a public official under a felony indictment may be suspended from office, EAves and two voters from his district brought this action to enjoin the Governor and the Attorney General from proceeding under the statute, contending the act is

unconstitutional. The trial court refused to issue the injunction and Eaves and the voters appealed. We granted them an expedited review.

Although O.C.G.A. § 45-5-6 as initially passed in 1984, Ga. L. 1984, p. 1279, provided only for the suspension of public officials who were indicted for felonies under state law, it was subsequently amended in 1986, Ga. L. 1986, p. 600, to encompass federal felony indictments as well, O.C.G.A. § 45-5-6(b), and as amended, it was in effect when Eaves was elected to his present term of office in 1986. Eaves and the two voters contend this statute is unconstitutional because it deprives them of due process and equal protection, violates the separation of powers, and conflicts with Art. II, Sec. II, Par. III of the Georgia Constitution, which prohibits one convicted

of a felony from holding public office.

When relief was refused Eaves by the trial court, proceedings under the statute continued while he pursued this appeal. The act requires that the attorney general forward to the governor a certified copy of the public official's felony indictment. Under subsection (e) of the act, the indicted public official is allowed fourteen days to seek suspension voluntarily. If the official does not agree to voluntary suspension -- and Eaves did not agree -- the governor must appoint a review commission, comprised of the attorney general and two public officials serving in the same capacity as the indicted official. O.C.G.A. § 45-5-6(b). Governor Harris accordingly appointed Bibb County Commissioner Emory Greene and Clarke County Commissioner John Jeffreys to serve on the review commission along with

Attorney General Michael J. Bowers.

The review commission must make a written report to the governor within fourteen days of the commission's appointment. "If the commission determines that the indictment relates to an adversely affects the administration of the office of the indicted public official and that the rights and interests of the public are adversely affected thereby, the commission shall recommend that the public official be suspended from office. If, and only if, the commission recommends suspension, then the Governor shall review the findings and recommendations of the commission and may suspend the public officer from office immediately and without further action pending the final disposition of the case or until the expiration of his term of office, whichever occurs first. . . . [T]he

public official shall continue to receive the compensation from this office." (Emphasis supplied.) O.C.G.A. § 45-5-6(c).

Though the act does not require that the review commission provide a hearing to the indicted official, Eaves and his lawyer were nonetheless invited to a hearing, at which they subsequently appeared. On the advice of the attorney general, and over Eaves' objection, the review commission declined to hear evidence concerning the merits of the charges against him. The commission, finding that the felony indictment related to Eaves' public office and adversely affected the public interest, recommended suspension. The Governor accepted the recommendation and suspended Eaves on November 20, 1987. This is the procedure that Eaves and the two voters contend is unconstitutional.

1. We have been cited no authority, nor do we know of any, recognizing a constitutional right of voters to continue to be represented by a person for whom they have previously voted but who has been subsequently indicted for a felony affecting his office. When Eaves' voters cast their ballots for him, the statute was in effect, providing that he could be suspended if he were indicted for a felony. His later suspension therefore did not in any way impair the voters' right to vote. Furthermore, the act provides that the Governor appoint someone else to represent the suspended official's constituents pending the resolution of the indictment. O.C.G.A. § 45-5-6(d)(1). Thus, the voters are not unrepresented during this time. Since the voters have no constitutional rights which are being abridged by the statute, the

trial court did not err in refusing injunctive relief to them.

2.(a) We do, of course, recognize that Eaves has a constitutional right to hold the public office to which he has been duly elected and that he cannot be deprived of that right through state action without due process of law. "But it is also true that an official takes his office subject to the conditions imposed by the terms and nature of the political system in which he operates." Gordon v. Leatherman, 450 F.2d 562, 565 (5th Cir. 1971). Here the legislature made Eaves' right to continue to exercise the prerogatives of his office dependent upon his not being indicted for a felony. Such a law is not unfair; it bears a rational relationship to a compelling state interest -- that of insuring the public's confidence in government. What

was said in Brown v. Dept. of Justice, 715 F.2d 662, 667 (Dist. of Col. Cir. 1983), a case regarding a public employee, applies with equal, if not greater, force to this case, where the one indicted is a public official: "An indictment is a public record, and public knowledge that an individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence in the agency. In addition, if an employee indicted on work-related charges were retained on the job and if the empoloyee engaged in conduct of the sort alleged in the indictment, the functioning of the agency might be severely hindered or even undermined. . . . An employee's suspension pending disposition of the criminal charges thus safeguards the public interest by removing the employee from a position where he or she might

repeat the alleged misconduct and thereby impede the lawful functioning of the agency and destroy public confidence in the agency. This does not violate the principle that the employee is presumed innocent until proven guilty. In suspending an employee solely on the basis of his or her indictment, the agency is making no assertion about the employee's guilt or innocence; rather, the suspension is merely a means of safeguarding the legitimate interests of the agency."

The suspension of an indictee is of limited duration[1]/ and exacts no loss of

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1/ O.C.G.A. § 45-5-6(d)(2)(i) provides that "[i]f a public official who is suspended from office under the provisions of this Code section is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the public official shall be reinstated to office. The public official shall not be reinstated under this subsection if he is not so tried based on a continuance granted upon a motion made by the defendant."

compensation. Thus, the act's measures intrude upon the constitutional rights of the public official only so far as is minimally necessary to maintain the public objectives. If the matter is resolved favorably to the official, he is fully restored to his former status. O.C.G.A. § 45-5-6(c). Balancing the public good against the indicted public official's right to hold office results in the conclusion that this law does not offen traditional notions of fair play and justice. Daniel v. C & S Nat. Bank, 182 Ga. 384, 396-398 (185 SE 696) (1936). In short, the statute does not on this score violate Eaves' right to due process.

(b) Eaves asserts, however, that the statute also fails to provide adequate procedural due process safeguards. His argument centers on his inability to put

before the review commission the merits of charges against him. He contends that procedural due process requires he be given the opportunity to challenge the validity of the indictment's charges, and that, in effect, the commission should decide his guilt or innocence before making its recommendation. Since such evidence was not permitted by the commission, the only evidence was the indictment.

In considering Eaves' due process challenge, we must always be cognizant of the temporary nature of the act's provisions and the resulting lesser standard of procedural due process required. In Matthews v. Eldridge, 424 U.S. 319, 334-335 (96 SC 893, 47 LE2d 18) (1976), the United States Supreme Court recognized that the amount of due process required depends upon the circumstances at hand: "'"[d]ue process,"

unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' [Cit.] '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' [Cit.]"

Significantly, this suspension entails only loss of official authority on a temporary basis with no loss of pay. What is more, the suspended official is safeguarded under the statute from prosecutorial foot-dragging, so that if he is not promptly tried he is restored to office. Even more important, the indictment, as the triggering device, depends upon a finding by a properly constituted grand jury that probable cause exists to believe the official has committed a crime. Finally, the review commission of his peers must determine that ushc a charge would affect his job performance. A review

panel "mini-trial" to prove misconduct is, by contrast, not a reasonable alternative procedure; mulling through the same evidence which may later be presented in court not only entails further risk for the official and further cost to the state, but would also constitute an improper interference with the criminal proceedings. Thus, the interests of both the official and the public are better protected by allowing suspension based on the fact of the indictment alone. We conclude, in sum, that the statute affords adequate due process protection to the public official pending resultion of the indictment.2/

2/ In Matthews, supra, 424 U.S. at 334-335, the United States Supreme Court observed that its "prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; Second, the risk of an . . . continued on next page . . .

(c) We also reject Eaves' claim describing the Governor's discretion under the act as absolute and unbridled, and as such, also depriving him of due process. The Governor's discretion is limited by the requirement that a body largely composed of the public official's peers finds his suspension warranted. Whatever "unbridled" discretion exists may be exercised only in favor of the public official: should the commission recommend <u>against</u> suspension, the governor has no authority to override

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2/ continued . . .
erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and Finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." In light of the foregoing analysis in this subsection of our opinion, we hold that the challenged statutory procedure adequately meets this test on all counts.

it. Accordingly, the official's right of due process is not violated by the discretion afforded the Governor.

3. Nor is thee any merit to Eaves' related contention that the Governor's discretion is so broad that it amounts to an improper delegation of the power to legislate under Sundberg v. State, 234 Ga. 482, 484 (216 SE2d 332) (1975). Compare Williamson v. Housing Auth. of Augusta, 186 Ga. 673, 681 (199 SE 43) (1938).

4. Eaves argues that he and the voters of his district are denied equal protection under the act. As to the voters, he contends that they, unlike other voters, are denied the representative of their choice. As we have stated earlier, we know of no constitutional right to be continuously represented by a particular elected official. Once elected, such a representative may

leave office for a variety of reasons -- one of which is provided under this statute. The candidates and the voters pursued the election under this condition, and the statute provides for a substitute representative while the public official is under suspension. See Division 1, supra.

In answer to Eaves' claim that he himself has been denied the right to equal protection, we find that the statute not only treats all elected officials similarly, but also has a rational basis for treating those public officials laboring under a felony indictment as a separate class. We consequently find no violation of equal protection. Gray v. McLendon, 134 Ga. 224(4) (67 SE 859) (1910). See generally, G. W. v. State of Ga., 233 Ga. 274, 275 (210 SE2d 805) (1974).

5. Finally, we cannot agree that the

act is pre-empted by the constitutional provision disqualifying for public office only persons who have been convicted of a felony. That same provision of the Constitution, 1983 Ga. Const., Art. II, Sec. II, Par. III, also provides that the legislature may establish other qualifications for office and thereby furnishes authority for this act. Because the statute provides only for suspension and not removal upon indictment, we find no conflict with the Constitution. Compare Lucas v. Woodward, 240 Ga. 770, 775 (243 SE2d 28) (1978); Gray v. McLenson, supra 134 Ga. at 239 (a).

In conclusion, for all these reasons, the trial court must be affirmed. Daniel v. C & S Bank, supra, 182 Ga. at 396-98. See generally Annot., 67 CJS 456, Officers, § 108; ANNO., 63A AmJur2d 874, Public Officers and Employees, §§ 289-295.

Judgment affirmed. All the Justices concur, except Smith, J., who dissents.

SMITH, JUSTICE, dissenting.

I am unable to agree with the majority's holding. The statute does violate Commissioner Eaves' constitutional right to due process.

The Attorney General stated that the commission "must accept the facts in the indictment for purposes of [the] deliberations as being true." He also stated that the following two questions must be answered by the review commission in making their decision. 1) "[I]f . . . the facts alleged in the four counts of the indictment are true, . . . would those allegations or do they relate to and adversely affect the administration of the office." 2) "[W]hether this indictment under this analysis relates to and adversely affects the interests of the public . . ."

Inasmuch as the statute only comes into action after the Attorney General has already decided that the indictment relates to the performance or activities of the office and no evidence is allowed, the review commission is forced to determine based solely on the four corners of the indictment, "that the indictment relates to and adversely affects the administration of the office of the indicted public official and that the rights and interest of the public are adversely affected thereby." O.C.G.A. § 45-5-6(c). If the review commission finds in the affirmative, it must "recommend that the public official be suspended from office." Id. The following comment of one of the members of the commission indicates the fatal flaw in the statute: "One of the most difficult jobs I have, which is today, is to try and make an

objective decision when in effect the decision has already been made." The statute, once triggered, makes the decision the review commission is supposed to make.

The statutory procedure does not comport with due process. "An elected city official who is entitled to hold an office under state law has a property interest in his office which can be taken from him only by procedures meeting the requirements of due process." Crowe v. Lucas, 595 F2d 985, 993 (5th Cir. 1979). "Due process of law, as guaranteed by article I, section I, paragraph III, of the [Georgia] Constitution (Code, Ann., § 2-103), includes notice and hearing as a matter of right in matters where one's property rights are involved. Robitzsch v. State, 189 Ga. 637 (7 S.E. 2d 387); Southern Ry. Co. v. Town of Temple, 209 Ga. 722, 724 (75 S.E. 554)." Sikes v.

Pierce, 212 Ga. 567, 568 (94 SE 2d 427) (1956). The statute does not provide for a meaningful hearing. There is no opportunity for the review commission to hear evidence[1]/ which might indicate that the indictment does relate to or adversely affect the administration of the office or the rights and interests of the public. More importantly, the statute does not provide the official an opportunity to present evidence to the contrary.

"All government, of right, originates with the people, is founded upon their will only, and is instituted solely for the good of the whole. Public officers are trustees and servants of the people and are at all

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1/ "[An] indictment is not evidence, but is merely the manner in which charges are brought before the court for trial." Skipper v. State, 257 Ga. 802, 805 (364 SE2d 835) (1988).

times amenable to them." Constitution of Georgia of 1983, Article I, Section II, Paragraph I. Removal of a public official under O.C.G.A. § 45-5-6 without a meaningful hearing not only denies the public official his right to due process, it abolishes the right of his constituents to have their duly elected official in office, and it denies the official a fundamental presumption in the law -- "Every person is presumed innocent until proved guilty."2/ O.C.G.A. § 16-1-5.

DECIDED FEBRUARY 16, 1988

Violation of Hobbs Act, etc.; constitutional question. Fulton Superior Court. Before Judge Williams.

2/ Without a doubt, when an office holder is suspended, the public generally assumes he has been tried and found guilty. After the suspension, in the public's mind, any court trial is a mere formality.

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Michael J. Bowers, Attorney General, Charles M. Richards, Assistant Attorney General, Meals, Kirwan, Goger, Winter & Parks, John J. Goger, David R. Bundrick, Larry H. Chesin, Floyd, Jones & Ware, Charles R. Floyd, Jr., for appellees.

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

A. REGINALD EAVES, PAMELA A. STANLEY, and DR. BERNARD J. BRIDGES,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. D-50722
JOE FRANK HARRIS, and MICHAEL J. BOWERS,	)	
Defendants.	)	

ORDER AND JUDGMENT

The above and foregoing matter having come before the Court for a determination upon Defendants' Motion for Summary Judgment, and the parties having stipulated that this Court can rule upon that motion instanter, the entire record herein having been read and considered, the Court finds as follows:

I. FINDINGS OF FACT

1.

Plaintiffs Pamela A. Stanley and Dr.

Bernard J. Bridges are residents of, and registered to vote in Fulton County, Georgia. Said Plaintiffs reside particularly in the Fifth District of the Fulton County Commission.

2.

Plaintiff A. Reginald Eaves is a duly elected member of the Board of Commissioners of Fulton County. Plaintiff Eaves was re-elected to this public office in 1986, for a four year term.

3.

Plaintiffs' Complaint challenges the constitutionality of O.C.G.A. § 45-5-6.

4.

This statute, which establishes a procedure for suspending public officials who are indicted for felonies relating to the activities of their office, was enacted in 1984. Ga. Law 1984, p. 1279, et seq.

5.

This statute was amended in 1986 to provide for suspension of public officials who are indicted by federal Grand Juries as well as state Grand Juries. Ga. Laws 1986, p. 600, §§ 1, 2.

6.

This statute was in effect at the time Plaintiff Eaves was elected to office in 1986.

7.

On October 16, 1987, a federal Grand Jury returned a True Bill of Indictment of Plaintiff Eaves on four counts of felony violations of the Hobbs Act, 18 U.S.C. § 1951.

8.

On October 19, 1987, acting pursuant to O.C.G.A. § 45-5-6, Defendant Bowers forwarded a certified copy of the indictment

to Defendant Harris.

9.

Acting pursuant to O.C.G.A. § 45-5-6, Defendant Harris, by Executive Order, extended through November 12, 1987, the time for Plaintiff Eaves to voluntarily authorize the Governor to suspend Plaintiff Eaves.

10.

On November 12, 1987, this Court verbally denied Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction. A written order to this effect was entered in this action on November 13, 1987.

11.

On November 13, 1987, acting pursuant to O.C.G.A. § 45-56, Governor Harris appointed a review commission to investigate the indictment of Plaintiff Eaves.

II. CONCLUSIONS OF LAW

1.

O.C.G.A. § 45-5-6 does not implicate Plaintiffs' voting rights.

2.

O.C.G.A. § 45-5-6 is not unconstitutionally vague.

3.

The Legislature had authority to enact O.C.G.A. § 45-5-6. O.C.G.A. § 45-5-6 is a valid exercise of the powers of the Legislature.

4.

O.C.G.A. § 45-5-6 does not violate the Constitutional doctrine of separation of powers.

5.

O.C.G.A. § 45-5-6 meets the requirements of substantive due process.

6.

O.C.G.A. § 45-5-6 does not violate Plaintiffs' rights to procedural due process.

7.

O.C.G.A. § 45-5-6 does not violate Plaintiffs' rights to equal protection.

8.

O.C.G.A. § 45-5-6 is not unconstitutional under the Constitution of the United States.

9.

O.C.G.A. § 45-5-6 is not unconstitutional under the Constitution of the State of Georgia.

10.

There is no genuine issue as to any material fact, and Defendants are entitled to judgment in their favor as a matter of law.

IT IS THEREFORE ORDERED AND ADJUDGED

that Defendants' Motion for Summary Judgment be, and it hereby is GRANTED. The Clerk of Superior Court of Fulton County is hereby directed to enter judgment in favor of Defendants in this action, with all costs cast upon Plaintiffs.

This ____ day of _____, 1987.

/s/
OSGOOD G. WILLIAMS
Judge, Fulton Superior
Atlanta Judicial Circuit

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

A. REGINALD EAVES, PAMELA A. STANLEY, and DR. BERNARD J. BRIDGES,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	FILE NO. D-50722
JOE FRANK HARRIS, and MICHAEL J. BOWERS,	)	
Defendants.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given this 22nd day of February, 1988 that A. Reginald Eaves, Pamela A. Stanley, and Dr. Bernard J. Bridges, plaintiffs in the above-styled case, hereby appeal to the Supreme Court of the United States from the Order of February 16, 1988, which, inter alia, declared that the Official Code of Georgia Annotated § 45-5-6, and the actions taken pursuant to it, do not violate the due process clause and

the equal protection clause of the Constitution of the United States.

This appeal is taken pursuant to 28 U.S.C. § 1257.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this date served a copy of the foregoing pleading on counsel for appellees by mailing copies of same to him addressed as follows:

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Assistant Attorney General
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This 13 day of May, 1988.

David F. Walbert
David F. Walbert

Supreme Court, U.S.
FILED
JUN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1866

In The
Supreme Court of the United States
October Term, 1988

A. REGINALD EAVES, et al.,
Appellants,

v.

JOE FRANK HARRIS, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1.

Does the statute in question violate citizens' voting rights by providing a procedure for temporarily suspending with pay local elected officials who are indicted for felonies related to the activities of their office?

2.

Does procedural due process require an adversarial administrative inquiry into guilt or innocence before an indicted public official can be suspended pending the outcome of their criminal trial?

3.

Does a statute violate equal protection by differentiating between local elected officials who have been indicted for corrupting their office, and local elected officials who have not been indicted?

4.

Does this case present a substantial federal question?

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TABLE OF AUTHORITIES

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CSC v. Letter Carriers, 413 U.S. 548 (1972) 6, 10

Federal Deposit Insurance Corporation v. Mallen, — U.S. —, 56 U.S.L.W. 4464 (Decided May 31, 1988) 7, 10

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1977) 6, 10

Logan v. Zimmerman Brush, 455 U.S. 319 (1981) 9

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STATUTE CITED:

Official Code of Georgia Annotated § 45-5-6 (Michie 1982, Supp. 1988) ..... *Passim*

THE STATUTE INVOLVED

At issue in this case is the constitutionality of a Georgia statute providing for the suspension with pay of elected officials indicted for felonies relating to the activities of their office. This statute is found at *Official Code of Georgia Annotated* § 45-5-6 (The Michie Company 1982, Supp. 1988) [hereafter cited as "O.C.G.A. § 45-5-6"].

The full text of the statute is set forth on Pages 2A-3 of Appellants' Jurisdictional Statement. Briefly, O.C.G.A. § 45-5-6 provides a mechanism whereby a local public official can be suspended with pay "upon indictment for a felony . . . which felony indictment relates to the performance or activities of the office. . . ." O.C.G.A. § 45-5-6(b). In such a case, a Review Commission is appointed to determine: (1) whether the indictment relates to and adversely affects the administration of the office; and (2) whether the rights and interests of the public are adversely affected thereby. O.C.G.A. § 45-5-6(c). If so, the Review Commission recommends to the Governor that the official be suspended. The Governor reviews the recommendation of the Review Commission, and "if and only if the commission recommends suspension," then the Governor "may" suspend the indicted official. O.C.G.A. § 45-5-6(c). The suspension is with pay. O.C.G.A. § 45-5-6(c). Unless the indicted official obtains a continuance of the trial, the suspension lasts only until the indicted official is tried, or until the expiration of the next regular or special term of the applicable court. O.C.G.A. § 45-5-6(i).

———o———

STATEMENT OF THE CASE

This case began on November 12, 1987, when Appellants filed an action in the Superior Court of Fulton County. Their Complaint alleged that O.C.G.A. § 45-5-6 is unconstitutional; and they sought preliminary and permanent injunctive relief against any action being taken to suspend Appellant Eaves.

On November 13, 1987, the trial court denied Appellants' prayers for preliminary injunction. On November 16, 1987, Appellees moved for summary judgment. In order to expedite the case, and in an attempt to have the matter reach the Georgia Supreme Court at the earliest possible date, the parties stipulated that the trial court could rule *instanter* upon the motion for summary judgment. Thus, also on November 16, 1987, the trial court entered an order granting Appellees' motion for summary judgment, holding that O.C.G.A. § 45-5-6 is constitutional.

The Georgia Supreme Court granted an expedited appeal. On February 16, 1988, the Georgia Supreme Court affirmed the judgment of the trial court, finding O.C.G.A. § 45-5-6 constitutional.

On February 22, 1988, Appellants filed their notice of appeal to the Supreme Court of the United States. Their Jurisdictional Statement was mailed to Appellees on May 13, 1988.

Appellees hereby move: (a) That the appeal be dismissed because no substantial federal question is presented; or, in the alternative, (b) That the decision of the Georgia Supreme Court be affirmed.

———o———

STATEMENT OF THE FACTS

In 1986, Appellant Eaves was elected as a county commissioner for Fulton County. At the time of his election, O.C.G.A. § 45-5-6 was in full force and effect. This statute provides a procedure for suspending public officials who are indicted for felonies relating to the activities of their office. Thus, Appellant Eaves' tenure in office was subject to the conditions set forth in O.C.G.A. § 45-5-6 at the time he was elected.

On October 16, 1987, a federal Grand Jury returned a True Bill of Indictment of Plaintiff Eaves on four counts of felony violations of the Hobbs Act, 18 U.S.C. § 1951. Appellant Eaves was accused of accepting bribes in exchange for his favorable vote on zoning matters before the county commission. This indictment resulted from an F.B.I. "sting" operation.

On October 19, 1987, acting pursuant to O.C.G.A. § 45-5-6, Appellee Bowers, the Attorney General of Georgia, forwarded a copy of the indictment to Appellee Harris, the Governor of Georgia. The Governor, by Executive Order, extended through November 12, 1987, the time for Appellant Eaves to voluntarily authorize his suspension by the Governor.

On November 12, 1987, declining to voluntarily suspend himself, and seeking to forestall his suspension under O.C.G.A. § 45-5-6, Appellant Eaves, with the other Appellants, filed an action seeking an injunction preventing his suspension. Appellants' prayers for preliminary injunctive relief were denied by the trial court on November 13, 1987.

After issuance of the trial court's order on November 13, 1987, acting pursuant to O.C.G.A. § 45-5-6, Appellee Harris appointed a Review Commission to inquire into the matter of the indictment of Appellant Eaves. Pursuant to the statute, Appellee Bowers was a member of the Review Commission.

The Review Commission scheduled a hearing for November 20, 1987. Appellant Eaves was given notice of the hearing, and of the nature of the inquiry. Appellant Eaves attended the hearing, and was represented by counsel, who argued on his behalf. At the conclusion of the hearing, the Review Commission voted to recommend to Governor Harris that Appellant Eaves be suspended from office.

Later on November 20, 1987, Governor Harris, acting upon the recommendation of the Review Commission, issued an Executive Order suspending Appellant Eaves, with pay, pending the outcome of his criminal trial upon the charges for which he was indicted. Shortly thereafter a temporary replacement county commissioner was appointed to act during Appellant Eaves' suspension.

From November 20, 1987 until May 2, 1988, Appellant Eaves was suspended with pay. On May 2, 1988, a federal jury convicted Appellant Eaves on three of the four counts for which he was indicted, acquitting him of the other.

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ARGUMENT

I.

THE STATUTE IN QUESTION DOES NOT LIMIT OR ABRIDGE VOTING RIGHTS IN ANY WAY.

By its terms, O.C.G.A. § 45-5-6 places no limit, condition or qualification upon anyone's voting rights. By their own accounts, Appellants Stanley and Bridges voted for Appellant Eaves in the 1986 election. Appellants Stanley and Bridges have had and continue to have the same rights as any other registered voters to go to the polls in any election and vote for whomsoever they please.

Appellants Stanley and Bridges do not argue that there has been any interference whatsoever with their actual right to vote. The true substance of their complaint is that they have not been continuously represented by the candidate for whom they voted. The Constitution does not, and cannot make any such guarantee.

Democratic processes, by their nature, anticipate that some candidates will win, while others lose. Thus, there is no "right" to be represented by the particular candidate for whom one voted. Also, since elected officials can leave or be removed from office for a variety of reasons, there is no unqualified "right" for the candidate of one's choice to remain in office for their full term. Finally, many laws provide for the filling of vacancies in office by appointment; and Appellees know of no authority for the proposition that such a procedure is inherently violative of the Constitution.

O.C.G.A. § 45-5-6 was in effect at the time of the 1986 election. Thus, when Appellants Stanley and Bridges voted

for Appellant Eaves, they did so subject to the condition that, if elected, he could be suspended if indicted for felonies relating to his office. The real question, then, is whether the Constitution prohibits the State of Georgia from imposing such a condition on its local elected offices. This, in essence, is a question of substantive due process.

The statute is clearly intended to protect the public's confidence in the integrity of its government. This is a goal which this Court has recognized as being of great importance, *See, First National Bank of Boston v. Bellotti,* 435 U.S. 765, 789 (1977); *Buckley v. Valeo,* 424 U.S. 1, 27 (1975); *CSC v. Letter Carriers,* 413 U.S. 548 (1972). Appellees submit that it will inevitably undermine the public's confidence in its government if an official who is indicted for corruption in office can continue exercising the powers of that office after being indicted. Thus, Appellees submit that this statute is rationally related to a compelling state interest, consistent with the requirements of substantive due process.

Appellees have never argued, and the Georgia Supreme Court did not hold, that the right to vote is not a fundamental right protected by the Constitution. The Georgia Supreme Court simply held that O.C.G.A. § 45-5-6 does not violate Appellants' right to vote. Appellees submit that this holding of the Georgia Supreme Court was eminently correct, and should be upheld by this Court.

II.

THE STATUTE IN QUESTION SATISFIES THE REQUIREMENTS OF PROCEDURAL DUE PROCESS.

Before the Review Commission recommended the suspension of Appellant Eaves, a hearing was held. Appellant

Eaves attended the hearing, was represented by counsel, and his counsel made a substantial argument against his suspension. The hearing was attended by a number of supporters of Appellant Eaves; and the transcribed discussions by the members of the Review Commission indicate that the arguments on behalf of Appellant Eaves were understood and considered.

Appellants argue that these procedures were inadequate because he was not afforded a full adversarial hearing into his guilt or innocence of the crimes for which he was indicted.

Appellees question the logic of such an argument in the context of this particular statute. The Review Commission is not charged with determining, or even inquiring into, guilt or innocence. Under O.C.G.A. § 45-5-6(c), the Review Commission is to determine two things: (1) Does the indictment relate to and adversely affect the administration of the office of the indicted official; and (2) Are the rights and interests of the public adversely affected thereby?

The indictment of a public official for corruption bears great potential for placing the office under a cloud pending the outcome of the criminal trial. Such a situation can cause harm to the rights and interests of the public, even though the indicted official may eventually be found innocent. It is this potential for harm to which O.C.G.A. § 45-5-6 is addressed; and it is this potential for harm which should be the proper focus of the Review Commission's inquiry. Since the Review Commission makes no inquiry into guilt or innocence, the presentation of evidence as to guilt or innocence would be of questionable benefit. Appellants' assertion that this procedure somehow creates

an irrebutable presumption of guilt is without foundation. As this Court has recently recognized, an indictment can provide a reasonable basis for suspension for at least two reasons: (1) The finding of "probable cause" [not "guilt"] by an independent body demonstrates that the suspension is not arbitrary; and (2) The return of the indictment is itself an objective fact that will in most cases raise serious public concern. *Federal Deposit Insurance Corporation v. Mallen*, — U.S. —, 56 U.S.L.W. 4464, 4468 (Decided May 31, 1988). The suspension is based upon the indictment of the official, not upon his guilt of the crimes for which he is indicted. Appellees submit that this is an appropriate policy, which does not violate any constitutional imperative.

It is an underlying assumption of Appellants' argument that an administrative inquiry into guilt or innocence would somehow be beneficial to the accused official. This argument cannot withstand logical analysis. Federal courts which have considered the question have noted the potential harm such a hearing could do to an accused person's defense in a subsequent criminal trial. *See; Polcover v. Secretary of the Treasury*, 477 F.2d 1223, 1232 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1001. Likewise, the interests of the public would not be well served. Administrative proceedings that preceded a criminal trial would "constitute improper intereference with the criminal proceedings if they churn over the same evidentiary material." *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975).

> "Thus, the interests of both the employees and the public are better protected by allowing suspension based on the fact of the indictment alone, rather than requiring administrative inquiry into the unlawful conduct alleged in the indictment." *Brown v. Dept. of Justice*, 715 F.2d 662, 668 (D.C. Cir. 1983).

Appellant Eaves was afforded notice, and a hearing at which he was given an opportunity to make his argument as to why he should not be suspended. Appellees submit that this hearing fully complied with the Constitutional requirement of procedural due process.

In determining what sort of process is due in a given case, there must be a balancing of the competing interests involved, including: (1) the importance of the private interest and the length or finality of the deprivation; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the magnitude of the governmental interests involved. *See, Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1975).

As to the importance of the private interest, as noted above, the precise interest at stake is Appellant Eaves' asserted right to continue exercising the powers of his office after being indicted for felonies related to his performance of that office. If this is a constitutionally protected "right," the degree of its importance is open to some debate. Coupled with the limited nature of the interest at stake, O.C.G.A. § 45-5-6 provides for a strictly limited deprivation. The indicted official is suspended *with pay* pending the outcome of his criminal trial. In another context, this Court has recognized that suspension with pay does not raise the same Constitutional concerns as suspension without pay. *See, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 544-545 (1984). Further, the statute places a strict limitation upon the possible duration of a suspension based upon an indictment, a

fact to which the Georgia Supreme Court properly attached great importance.

As to the risks of an erroneous deprivation, it is submitted that they are not unreasonably great. Appellants devote considerable energy to an argument that a grand jury may erroneously indict an innocent person. Again, this argument is somewhat beside the point. The Review Commission does not inquire into guilt or innocence. The Review Commission is concerned with whether the indictment relates to and adversely affects the office, and whether the interests of the public are harmed thereby. It is submitted that the procedures followed are sufficient to make such a determination with reasonable accuracy. This Court has recently noted that it is unlikely that a suspension based upon an indictment will be erroneously imposed. *Federal Deposit Insurance Corporation v. Mallen, supra.* The additional procedural "safeguard" suggested by Appellants, an adversarial inquiry into guilt or innocence, would, if anything, be of negative value.

Finally, as noted above, the governmental interest involved is of great importance. It is extremely important for a democratic society to preserve the faith of citizens in the integrity of government. *See, First National Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1977); *Buckley v. Valeo*, 424 U.S. 1, 27 (1975); *CSC v. Letter Carriers*, 413 U.S. 548 (1972).

The Georgia Supreme Court held that O.C.G.A. § 45-5-6 affords adequate due process protection to the indicted official pending resolution of the indictment. This holding should be affirmed.

III.

THE STATUTE IN QUESTION COMPORTS WITH THE REQUIREMENTS OF EQUAL PROTECTION.

In broad terms, equal protection requires that persons similarly situated be treated with equality. *Plyer v. Due,* 457 U.S. 202, 216 (1982).

Appellants Stanley and Bridges claim that they have been denied equal protection because, during the term of Appellant Eaves' suspension, they have been represented by an appointed commissioner, whereas residents of other commission districts [whose commissioners have not been indicted] are represented by elected commissioners.

Appellant Eaves claims that he has been denied equal protection because he has been suspended from office, whereas county commissioners who have not been indicted can continue to exercise the powers of their office.

The argument that Appellants Stanley and Bridges are represented by someone whom they have not chosen, and whose goals for the county might differ from their own, is not a cognizable equal protection argument. Any time a vacancy in a local office is filled by appointment, the voters in that locality will be represented by someone they did not elect. Any voter who did not vote for a successful candidate will be represented by someone whose goals for the locality might differ from those of the unsuccessful voter. The Constitution cannot and does not guarantee against such eventualities.

O.C.G.A. § 45-5-6 comports with the requirements of equal protection because it treats those similarly situated

with equality. The statute applies equally to all public officials who fall within its purview. The only time such officials would receive any different treatment under O.C.G.A. § 45-5-6 would be when they are indicted for felonies related to their performance of their office. There is, it is submitted, an entirely rational reason for differentiating between officials who have been indicted for corrupting their office and officials who have not been indicted.

The Georgia Supreme Court held that O.C.G.A. § 45-5-6 not only treats all elected officials similarly, but also has a rational basis for treating those elected officials laboring under a felony indictment as a separate class. Therefore, the Georgia Supreme Court found that O.C.G.A. §45-5-6 does not violate equal protection. This holding should be affirmed.

IV.

THE APPEAL SHOULD BE DISMISSED BECAUSE NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

As noted above, the "right" which Appellants seek to have exonerated by the Supreme Court of the United States is a purported right of a county commissioner to continue exercising the powers of his office after being indicted for corrupting that very office. This "right," if it is one, is one which is very confined in scope.

The "deprivation" in this case is a temporary suspension with pay. It is impossible to envision a statute which could impose a milder sanction and still achieve the goal of preventing the indicted official from exercising

the powers of his or her office pending the outcome of the criminal trial.

Balanced against the limited private right at stake, the State of Georgia has what this Court has recognized as a strong interest in preserving the faith of citizens in the integrity of their government.

In view of the dubious nature of the private "right" asserted, and the strictly limited nature of the "deprivation" worked by the statute involved, and the compelling State interest at stake, Appellees submit that this case simply does not present the sort of substantial federal question required to invoke the jurisdiction of the Supreme Court of the United States. Therefore, the appeal should be dismissed.

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CONCLUSION

For the reasons set forth above, Appellees respectfully move the Court: (a) That the appeal be dismissed; or, in the alternative, (b) That the decision of the Georgia Supreme Court in this case be summarily affirmed.

Respectfully submitted,

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